ARAB-MALAYSIAN MERCHANT BANK BHD

v.

DOMINANCE RESOURCES SDN BHD & ANOR

HIGH COURT SABAH & SARAWAK, SIBU
CLEMENT SKINNER J
[SUIT NO: 22-56-2000]
6 APRIL 2001

CIVIL PROCEDURE: *Pleadings - Striking out writ - Whether writ may be struck out for failure to comply with O. 6 r. 2(1)(b), O. 18 r. 6 (1)(a), (b), & O. 18 r. 6(4)(b) of the Rules of the High Court 1980 - Whether writ invalid, bad/or ineffective and ought to be set aside for irregularity*

CIVIL PROCEDURE: *Writ of summons - Service - Whether defendants should be served a sealed copy - Normal practice under O. 62 r. 3(a) of Rules of the High Court 1980*

The 2nd defendant was a guarantor to some credit facilities granted by the plaintiff bank to the 1st defendant. Upon the defendants having failed to comply with the payment demands, the plaintiff commenced this action causing to be served a writ of summons to the defendants. On being served, the defendants were granted leave to enter conditional appearance so as to enable them to apply to set aside the writ herein as well as its service thereof. This was the hearing of those applications.

The defendants sought to set aside the writ in that it was invalid, bad/or ineffective and it ought to be set aside for irregularity on the following four grounds: (i) that the writ failed to comply with O. 6 r. 2(1)(b) of the Rules of the High Court 1980 ('RHC'); (ii) that the writ did not comply with O. 18 r. 6(1)(a) and (b) of the RHC in that it did not bear the year in which the action was issued, the number of the action and the title of the action (the 'particulars'); (iii) that the statement of claim indorsed on the writ did not comply with O. 18 r. 6(4)(b); and (iv) that the defendants were served with an "unsealed" copy of the writ.

Held:

[1] Order 6 r. 2(1)(b) RHC requires that where a claim made by the plaintiff is for a debt or liquidated demand only, the plaintiff must, before issuing the writ, indorse it with a statement of the amount claimed in respect of the debt or demand. (p 4 d-e)

[1b] However, in a situation like this where a statement of the amount claimed in respect of the debt or liquidated demand had already been contained or set out in the statement of claim and prayers indorsed on the writ, r. 2(1)(b) does not require a separate indorsement because the statement of claim indorsed on the writ had already served that purpose and, therefore, satisfied the requirement of O. 6 r. 2(1)(b). Accordingly, the defendants' complaint was rejected. (p 5 d & h)

[2] The statement of claim in this case, was indorsed on the writ and had become part of the writ on which it was indorsed. Thus, there was no requirement to herald it with the said particulars because such information was already stated on the face of the writ on which the statement of claim was indorsed. Hence, the defendants second complaint was untenable. (p 6 c, g, h)

[3] A statement of claim indorsed on a writ is not a "pleading by itself and separate from the writ of summons". While it is a pleading as well as a writ, it is part of the writ on which it is indorsed. Since the writ already bore an indorsement as to the firm of solicitors who issued the writ and their business address, the provision of O. 18 r. 6(4)(b) of the RHC will have no application to the facts of the instant case. (p 7 c-d)

[4] The defendants contended that as a writ is only issued upon its being signed, sealed and dated by the registrar, the copy of the writ that was served on them should have been a sealed copy. However, there is no need to serve a sealed copy of the writ on a defendant. Under O. 62 r. 3(a) RHC a defendant is not served with a sealed copy of the writ but showed to him at the time of service, if he should request a sealed copy. (pp 8 a & 11 a & f)

[1st and 2nd defendants' applications dismissed with costs.]

Legislation referred to:

Rules of the High Court 1980, O. 1 r. 7, O. 6 rr. 1, 2(1)(a), (b), 6(2), (3), (4), O. 10 r. 1, O. 18 rr. 6(1)(a), (b), (4)(b), O. 62 r. 3(a), O. 92 r. 2

Rules of the Supreme Court 1965 [UK], O. 10 r. 1(6)

Other source(s) referred to:

Atkin, *Court Forms*, 1991, 2nd edn, vol 41, p 372, paras 17, 18

LB Curzon, *Dictionary of Law*, 4th edn, p 232

For the plaintiff - Yong Sie Mee; M/s Goh & Partners
For the 1st & 2nd defendants - Idris Abdullah; M/s Idris & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

Clement Skinner J:

The plaintiff, a licensed merchant bank, granted credit facilities to the 1st defendant company while the 2nd defendant stood as guarantor to those facilities. On various dates in January 2000, the plaintiff demanded repayment from the 1st defendant of all outstanding sums due to it and, on various dates in March 2000, also demanded payment from the 2nd defendant under the two guarantees that he had signed. The defendants having failed to comply with the demands made on them, the plaintiff commenced this action on 22 May 2000.

To do so, the plaintiff caused to be issued out of the registry of the High court of Sabah and Sarawak at Sibu, a writ of summons on which the plaintiff had indorsed its statement of claim. The indorsement is heralded by the words "statement of claim" and the facts giving rise to the plaintiff's cause of action against the 1st and 2nd defendants are pleaded in ten numbered paragraphs and end in a prayer which reads as follows:

> AND the Plaintiff claims against the 1st and 2nd Defendants:
>
> (a) the sum of RM3,793,296.78 as stated in paragraph 4 hereinabove;
>
> (b) interest on the principal sum of RM3,745,000.00 at the rate of 9.5% per annum calculated from 25th January, 2000 until full and final payment;
>
> (c) fixed costs;
>
> (d) costs on solicitor-client basis; and
>
> (e) such further or other relief as the Court deems appropriate.

The plaintiff's advocates subscribed their signature at the bottom of the prayers to the statement of claim and immediately thereafter, there followed an indorsement to the effect that if the 1st and 2nd defendants pay to the plaintiff or their advocates within 20 days after the service of the writ the amount claimed and costs (which the plaintiff had indicated at RM125), further proceedings would be stayed. I shall refer to this indorsement as the "20-day costs indorsement".

Immediately following the 20-day costs indorsement, there followed another indorsement showing which firm of advocates had issued the writ on behalf of the plaintiff, and their business address within the jurisdiction. For completeness, I should also mention that the writ contained the usual indorsement as to service (which was left blank).

a On being served, the 1st and 2nd defendants applied for, and were granted, leave to enter conditional appearance so as to enable them to apply to set aside the writ herein as well as the service thereof. To do so, each defendant filed separate applications. This is the hearing of those applications.

b Idris Abdullah of counsel for the defendants indicated that as both applications raise common issues, he would address the court on the 2nd defendant's application only and adopt all his arguments made on it for the 1st defendant's application.

c The 2nd defendant seeks to set aside the writ on the grounds that it is invalid, bad and/or ineffective and ought to be set aside for irregularity. He gives four reasons for saying so. The 2nd defendant goes on to argue that if the writ is irregular, the service thereof must also be set aside.

d The first reason given by the 2nd defendant for saying that the writ is irregular was that it failed to comply with O. 6 r. 2(1)(b) Rules of the High Court 1980 (hereafter 'the RHC'). That sub-rule requires that where the claim made by the plaintiff is for a debt or liquidated demand only, the plaintiff must, before issuing the writ, indorse it with a statement of the amount claimed in respect of the debt or demand.

e It is the complaint of the 2nd defendant that the plaintiff's claim herein is for a debt or liquidated demand only but the plaintiff had failed, in breach of O. 6 r. 2(1)(b), to indorse the writ with a statement of the amount claimed in respect of the debt or demand.

f It is quite evident in this case that the plaintiff had exercised its right under O. 6 r. 2(1)(a) to indorse the writ with a statement of its claim, and a reading of that indorsement shows that it is a full and proper pleading wherein are set out all the material facts giving rise to the plaintiff's claim, such as, the nature and amount of the credit facilities offered to the 1st *g* defendant, the dates of the offer and their acceptance, the mode of the offer, what rates of interest were to be charged, the dates on which the 2nd defendant executed the guarantees and indemnities and the dates and mode of demand made on the 1st and 2nd defendants prior to the commencement of this action. In particular, para. 5 of the plaintiff's *h* statement of claim states that as at 25 January 2000, the total amount owing by the 1st defendant including interest amounted to RM3,793,296.78.

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I had also in setting out the facts of the case, taken some pains to describe what is stated in the prayers to the statement of claim. From the submissions made by counsel for the 2nd defendant, it is evident that even though the statement of claim as well as its prayer contain a statement of the amount claimed from the defendants in respect of the debt or liquidated demand, the 2nd defendant nevertheless expects the plaintiff to make another indorsement on the writ to the effect that it is claiming the amount of RM3,793,296.78 from the 1st and 2nd defendants, just because the plaintiff's claim is for a debt or liquidated demand. When I enquired from counsel for the 2nd defendant where this indorsement should appear and in what terms?, his answer was: "Just before the 20-day costs indorsement", and in the following terms: "The plaintiff's claim is for the sum of RM3,793,296.78." To me, that amounts to nothing more than repeating what is already stated in the statement of claim and its prayer.

The question is, does O. 6 r. 2(1)(b) require the plaintiff to do so in a case such as this, where a statement of the amount claimed in respect of the debt or liquidated demand is already contained or set out in the statement of claim and prayers indorsed on the writ? In my judgment, r. 2(1)(b) does not require a separate indorsement because the statement of claim indorsed on the writ already served that purpose and, therefore, satisfies the requirements of O. 6 r. 2(1)(b). To hold otherwise would only mean that the rules were being adhered to slavishly as it serves no purpose to repeat in a separate indorsement, what is already found indorsed on the same writ. In support of what I say, I would refer to the following passage found in Atkin's *Court Forms*, 2nd edn, vol. 41 1991 issue at p. 372, para. 18 under the heading: "indorsement of claim for debt or liquidated demand only".

> Where the claim made by the plaintiff is for a debt or liquidated demand only, ie, without any other claim being added, the writ must be indorsed before it is issued with a statement of the amount claimed in respect of the debt or demand. **The indorsement will ordinarily take the form of a statement of claim**, and therefore the cause of action giving rise to the debt or demand must be sufficiently, though concisely pleaded, with particulars, stating the date when payment was due. (emphasis added).

I accordingly reject the 2nd defendant's complaint that the plaintiff's writ did not comply with O. 6 r. 2(1)(b).

The second reason given by the 2nd defendant for saying that the writ is irregular was because the statement of claim indorsed on the writ did not comply with O. 18 r. 6(1)(a) and (b) which reads:

6(1) Every pleading in an action must bear on its face:

(a) the year in which the writ in the action was issued and the number of the action;

(b) the title of the action; and

(c) the description of the pleading.

It is the complaint of the 2nd defendant that the statement of claim indorsed on the writ does not bear the year in which the writ in the action was issued, the number of the action and the title of the action. I am not surprised. The statement of claim has, in this case, been indorsed on the writ and has become part of the writ on which it is indorsed. In such a case, it is the face of the writ that will bear the year in which the writ in the action was issued, the number of the action as well as the title of the action.

In my judgment, the particulars stated in O. 18 r. 6(1)(a) and (b) would need to be stated on the face of a statement of claim only in those instances where a plaintiff has chosen to issue and serve a generally indorsed writ, in which event, the rules require that he must serve on the defendant a statement of claim as a pleading. In support of what I have said regarding a statement of claim becoming a part of the writ on which it is indorsed, I would again refer to Atkin's *Court Forms*, 2nd edn, vol. 41, 1991 issue at p. 372, para. 17 under the heading "indorsement with statement of claim" where it is stated:

> A statement of claim indorsed on a writ is a pleading as well as a writ. It may therefore be amended once without leave, and as it is also part of the writ on which it is indorsed and is served as part of the writ, it may be served at any hour of the day or night.

Thus, a statement of claim found indorsed on a writ having become part of the same, there is, in my view, no requirement to herald it with the year in which the writ in the action was issued, the number of the action and the title of the action because all those particulars are already stated on the face of the writ on which the statement of claim is indorsed.

I accordingly find the 2nd defendant's complaint against the statement of claim based on O. 18 r. 6(1)(a) and (b) to be untenable.

The third reason given by the 2nd defendant for saying the writ is irregular was that the statement of claim indorsed on the writ, did not comply with the provisions of O. 18 r. 6(4)(b) which states that:

6(4) Every pleading of a party must be indorsed:

(a) ...

(b) ..., with the name or firm and business address of the solicitor by whom it was served.

It is the contention of the 2nd defendant that the statement of claim indorsed on the writ is a pleading by itself and separate from the writ of summons and therefore must bear an indorsement of the name of the firm of solicitors who served the statement of claim and their business address. With respect, I do not think counsel for the 2nd defendant is correct in his contention. In the first place, for the reasons already given above, a statement of claim indorsed on a writ is not a "pleading by itself and separate from the writ of summons", as contended by counsel. While it is a pleading as well as a writ, it is part of the writ on which it is indorsed. And since the writ already bore an indorsement as to the firm of solicitors who issued the writ and their business address, the provisions of O. 18 r. 6(4)(b) will have no application to the facts of this case. In my judgment, those provisions only refer or apply to a statement of claim which is served as a pleading on its own.

Since I have ruled against the 2nd defendant on all the three complaints he has raised on the regularity of the writ, I have not found it necessary to address the submission made to me on the interpretation that should be placed on the word "must" found in O. 6 r. 2(1)(a) and (b), O.18 r. 6(1)(a) and (b) and O. 18 r. 6(4)(b) RHC.

With that, I turn to consider the fourth complaint raised by the 2nd defendant, which is that, he was served with an "unsealed" copy of the writ. According to the 2nd defendant, he must be served with a sealed copy of the writ. The 2nd defendant puts his argument this way: Order 10 r. 1 RHC requires that "a writ must be served personally ...". According to counsel, the "writ" referred to in the aforementioned rule can only mean a writ of summons that is issued out of the registry of the High Court pursuant to O. 6 r. 6(3) RHC which describes what the registrar does when a plaintiff wishes to issue a writ and presents it for sealing. Order 6 r. 6(3) reads as follows:

6(3) The Registrar shall assign a serial number to the writ and shall sign, seal and date the writ whereupon the writ shall be deemed to be issued.

So the 2nd defendant contends that as a writ is only issued upon its being signed, sealed and dated by the registrar, the copy of the writ that was served on him should have been a sealed copy. In his affidavit of 17 July 2000, the 2nd defendant exhibited as 'L1' the writ that was served on him and counsel for the 2nd defendant pointed out that it did not bear any seal of the court. However, a perusal of the exhibited writ shows that at the top left corner of the face of the writ, there appears the letters "LS" enclosed in a circle.

Yong Sie Mee, counsel for the plaintiff says that the writ that was served on the defendant was duly issued out of the registry of this High Court, and, the writ that was served on the 2nd defendant was a copy that had been returned to the plaintiff's solicitors by the registry and bore on its face the letters "LS" in a circle which letters had been stamped onto the face of the writ by the registry as is the practice in the High Court in Sabah and Sarawak. Yong also drew my attention to the practice of the registry of the High Court in Sabah and Sarawak in sealing writs upon their being presented for issue. According to Yong, the registry embosses the seal of the court on two copies of the writ only – all other copies of the writ, including the copy to be served on a defendant do not bear any seal of the court but will bear on its face the letters "LS" in a circle, which is stamped onto the writ by the Registry. Accordingly, Yong says that the 2nd defendant's insistence on being served a sealed copy of the writ is without any basis.

So, the question that arises for determination is, must a defendant be served with a sealed copy of the writ? To answer that question, it will be necessary to look at the procedure involved in the issuance of a writ, the practice of the registry in respect thereof, and the rules governing the service of a writ.

Order 6 r. 1 requires that every writ must be in form 2 or 3, whichever is applicable and these forms must be used with such variations as the circumstances of the particular case require (see O. 1 r. 7). For present purposes, when form 2 and 3 are referred to, it will be noticed that the word "(seal)" is found in brackets at the top left side of the form. That to me indicates where the seal of the court is to be affixed to or embossed or impressed on the writ.

What the plaintiff has to do to obtain the issuance of a writ, what takes place on the issuance of the same and how many copies of the writ must be presented for issuance are provided for in O. 6 r. 6(2), (3) and (4) which reads as follows:

6(2) A plaintiff or his solicitor must, on presenting a writ for sealing, leave with the Registrar the original and a copy together with as many copies thereof as there are defendants to be served.

(3) The Registrar shall assign a serial number to the writ and shall sign, seal and date the writ whereupon the writ shall be deemed to be issued.

(4) The original writ must be filed in the Registry and an entry thereof made in the cause book.

From the above provisions, it will be seen that:

(i) the words "leave with the registrar the original and a copy together with as many copies thereof as there are defendants to be served" indicate that the number of copies of the writ which should be prepared for issue is two plus one copy for each defendant to be served;

(ii) the writ is deemed to be issued once the registrar assigns a serial number to the writ and has signed, sealed and dated the same;

(iii) the original writ is always retained and filed in the registry, and it is therefore the copy and as many other copies as there are defendants to be served that are returned to the plaintiff;

(iv) the assigning of a number to the writ, and the signing, sealing and dating thereof are all official acts of the registrar.

Now, a reading of the provisions of O. 6 r. 6(2), (3) and (4) give no indication as to how many copies of the writ that are presented for issue are sealed with the seal of the court. In so far as the seal of the court is concerned, O. 92 r. 2 RHC states that every document issued by the registry for which a form marked with the word "seal" as prescribed in appendix A must bear the seal of the court and the words "every document" would include a writ. However, as all practitioners will know, not every writ issued by the Registry is embossed or impressed with the seal of the court. This is where the practice of the registry of the High Court in Sabah and Sarawak becomes relevant. It is the practice of this registry that upon presentation, the seal of the court will be embossed upon or impressed onto two writs only. Of the two writs bearing the seal of the court, one is treated by the registry as the original and retained in the court file. The other sealed copy of the writ is returned to the plaintiff and no matter how many other copies of the writ are presented for issue for purposes of service on each defendant, it is not the practice of the registry to seal each of them: instead, the registry will stamp on the top left face of each copy of such writ the letters "LS" in a circle and return them to the plaintiff.

The practice of stamping the letters "LS" in a circle onto a writ by the registry is carried out in accordance with practice note no. 1 of 1980 issued by the registrar of the then High Court in Borneo which in its material parts read:

> Rules of the High Court, 1980
>
> The Chief Justice directs that when the Rules of the High Court, 1980 come into force on 1st June, 1980, the Forms appended to the Rules are to be used as guides with such variations as circumstances may require.
>
> 2. With this in mind and with a view to standardisation, the following variations are to be made:
>
> (i) ...
>
> (ii) ...
>
> (iii) In all the Forms, where it is marked for the seal the letters LS in a circle should appear, thus LS. It is to be noted that the seal is at the top in a Form initiating action. In the other Forms, it is at the bottom.
>
> (iv) ...
>
> (v) ...
>
> (vi) ...
>
> (vii) ...
>
> Kuching: 17th May, 1980 Sgd: (Steve L.K. Shim)
> Registrar.

The letters "LS" are the initials for the latin words *locus sigilli*, which are defined in LB Curzon's *Dictionary of Law*, 4th edn at p. 232 as:

> Place of the seal. "LS" may be used in a document to show where the seal should be. See *First National Securities Ltd. v. Jones* [1978] 2 All ER 221.

Since there is a mark for the seal in form 2 and 3, the direction contained in practice note no. 1 of 1980 obviously obviates the necessity for the seal of the court to be affixed to each and every copy of the writ that is issued out of the registry: the letters "LS" in a circle instead appear in place of the court seal and indicate to anyone receiving a writ imprinted with such letters where the seal should be.

So, when a writ is served, is the defendant to be served with a sealed copy of the writ or is the service of a copy writ marked with the letters "LS" in a circle sufficient? In my judgment, there is no need to serve a sealed copy of the writ on a defendant. I say so for the following reasons. There is nothing in the rules to indicate that it is a sealed copy of the writ that is served on a defendant. Instead, the rules and practice indicate the opposite because:

(i) when service of a writ is effected by way of personal service on a defendant, O. 62 r. 3(a) requires that if a defendant so requests, he must be shown the sealed copy of the writ. If the defendant is to be served with a sealed copy of the writ, there would be no need for him to be shown, on request, the sealed copy.

(ii) On issue of a writ, only two copies are sealed; one of which is retained by the registry as the original and the other sealed copy returned to the plaintiff. If there are more than one defendant to be served and if each defendant is required to be served with a sealed copy of the writ, it would be impossible to do so.

(iii) It is the sealed copy of the writ which is returned to the plaintiff that is shown to a defendant if, on being served, he should insist on being shown a sealed copy of the writ. If that sealed copy is to be served on the defendant, the plaintiff would not have a sealed copy left to show to another defendant who, on being served, can insist on being shown a sealed copy of the writ.

Before leaving this subject, I should point out that our practice, under O. 62 r. 3(a) RHC, of not serving a defendant with a sealed copy of the writ but showing to him at the time of service, if he should request it, a sealed copy thereof, is markedly different from the practice in England where a defendant is served with a sealed copy of the writ. This is so because O. 10 r. 1(6) of the English Rules of the Supreme Court 1965 expressly provides that:

> Every copy of a writ for service on a defendant shall be sealed with the seal of the office of the Supreme Court out of which the writ is issued and shall be accompanied by a form of acknowledgment of service in Form No. 14 ... .

In the result, there are no reasons to set aside the writ or the service thereof on the grounds relied upon by the 2nd defendant. What I have just said will apply equally to the 1st defendant as it relies on the same grounds (except for the 4th ground) and arguments as the 2nd defendant. Before I conclude, I wish to say that the 1st defendant did in its affidavit say that the service of the writ on it by leaving the same at No. 153, 2nd Floor,

Jalan Kampong Nyabor, Sibu, Sarawak was bad in law but counsel for the 1st defendant did not address me at all on this point and I must therefore take it to have been abandoned. Counsel for the 2nd defendant had also in his written submissions complained that whereas the 2nd defendant had made several positive averments in his affidavits filed in support of his application and in reply to the affidavits filed by the plaintiff, the plaintiff had merely denied generally the averments made by the 2nd defendant, and must therefore be deemed to have admitted all the averments made by the 2nd defendant in his affidavits.

I regret I do not agree with this submission. The averments made by the 2nd defendant on his complaints regarding the plaintiff's non-compliance with O. 6 r. 2(1)(b), O. 6 r. 2(1)(a), O. 18 r. 6(1) and O. 18 r. 6(4)(b) RHC merely state that the plaintiff had failed to comply with the abovementioned rules. The 2nd defendant did not even say why the plaintiff had not complied with those rules. Yet, the 2nd defendant complains that the plaintiff had merely denied generally his averments. I do not see what else or how else the plaintiff could have denied or replied to the general averments of the 2nd defendant.

The 1st and 2nd defendants' applications are dismissed with costs.